Federal Labour Court: Age discrimination in annual leave (Birkenstock)?

Pia Pracht **Cologne, 19 January 2015**

Headnote

If an employer gives older employees more annual leave than their younger co-workers, this difference in treatment on the basis of age may be permissible if intended to afford older employees special treatment or protection pursuant to § 10 sent. 3 no. 1 of the General Equal Treatment Act (*Allgemeines Gleich-behandlungsgesetz* – AGG). When determining whether an employer's voluntary decision to adapt such a policy as regards annual leave serves to protect older employees and is suitable, necessary and appropriate within the meaning of § 10 sent. 2 of the General Equal Treatment Act, it is necessary to take into account the fact that employers have discretionary prerogative powers that will regularly vary depending on their company's concrete situation.

Facts

The defendant, whose company is not a party to a collective bargaining agreement, produces shoes and gives employees involved in shoe production who have reached the age of 58 36 working days of paid leave annual leave, which means two days more that what younger employees receive. The plaintiff, who was born in 1960, was of the opinion that this arrangement constituted age-based discrimination and also felt entitled to 36 days of annual leave.

Decision

The Federal Labour Court dismissed the plaintiff's appeal in its judgment of 21 October 2014 (9 AZR 965/12), reasoning that the defendant had not exceeded the bounds of its operating latitude and discretionary judgment by assuming that employees involved in physically exhausting and heavy work in connection with the production of shoes in the employer's plant needed more time to recuperate from their work than younger employees once they reach the age of 58. The court found that this also applied as regards the assumption that an additional two days of annual leave were appropriate on the basis of the greater need for rest, especially since the industry-wide collective bargaining agreement for the shoe industry of 23 April 1997, which was not binding upon the defendant and the plaintiff since they were not party to the agreement, called for two additional days of annual leave for employees as of the age of 58.

Comments

Provisions that call for longer annual leave for older employee are frequently found in employment contracts and collective agreements. In a case decided in 2012 (judgment of 20 March 2012 - 9 AZR 529/19), for example, the Federal Labour Court found that age-based discrimination existed in the case of differences in annual leave based on the age of the employees. That decision involved provisions of the Collective Agreement for Public Service Employees (*Tarifvertrag für den öffentlichen Dienst* – TVöD) that allowed older employees to take more days of annual leave than their younger colleagues, in which case the increase in the number of days of annual leave became effective when employees turned 30 and then 40. In the case of the present decision, the Federal Labour Court did not, however, see age-based discrimination of younger employees due to the longer annual leave accorded to older employees. Nevertheless, the two decisions of the Federal Labour Court are not inconsistent with one another.

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§ 1 and § 7 of the General Equal Treatment Act prohibit age discrimination. However, § 10 of the General Equal Treatment Act does allow differences in treatment of employees on the basis of age under exceptional circumstances, but any difference in treatment on the basis of age must be objective, appropriate and justified by a legitimate purpose. In addition, the means to this end must also be appropriate and necessary.

Unequal treatment as regards the number of days of annual leave can essentially be justified by the need of older employees for more time to recuperate. This argument was, however, not accepted in the decision from the year 2012 since an increase in the time needed to recuperate already at the age of 30 or 40 did not seem plausible. The situation is, however, different in the case of the present decision. The difference in treatment as regards annual leave due to age was justified and did not therefore constitute improper discrimination. There is no fixed age for recognition of a need for more time to recuperate but special protection for employees who have already reached the age of the 58 does seem to qualify as a legitimate goal. Employment in the defendant's shoe factory involved heavy work that was physically tiring, and it would be reasonable for the defendant to assume that employees needed more time to rest up and recover from such work once they reached the age of 58.

In summary, it can be concluded that it is basically up to employers to decide how many extra days of annual leave to give older employees and to set the age for eligibility. An employer's decisions need only be plausible and appropriate.

Note

This overview is intended exclusively for the purposes of general information and is not a substitute for qualified legal advice in an individual case. If you should have any questions, please get in touch with your usual contact at GÖRG or the author Pia Pracht by phoning +49 221 33660-524 or sending an e-mail to ppracht@goerg.de an. For information about the author, please visit our website at www.goerg.de.

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